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Reasons for Decision

Syndicat des débardeurs, Local 375 of the Canadian
Union of Public Employees; Éric Collin,

applicants,

and

Maritime Employers Association,

respondent.

Board Files: 29536-C and 29537-C
Neutral Citation: 2012 CIRB 652
July 27, 2012

The Board was composed of Ms. Louise Fecteau, Vice-Chairperson, sitting alone pursuant to section 14(3) of the *Canada Labour Code (Part I—Industrial Relations)* (the *Code*). An oral hearing was held in Montréal, Quebec, on July 26, 2012.

Appearances

Mr. Jacques Lamoureux, for the Syndicat des débardeurs, Local 375 of the Canadian Union of Public Employees, and Mr. Éric Collin;

Mr. Patrick Galizia, for the Maritime Employers Association.

These reasons for decision were written by Ms. Louise Fecteau, Vice-Chairperson.

I–Nature of the Application

[1] On July 12, 2012, the Syndicat des débardeurs, Local 375 of the Canadian Union of Public Employees (the union), and Mr. Éric Collin, Industrial Safety Representative, filed an application for an interim order pursuant to section 19.1 of the *Code* (file no. 29536-C) in connection with a complaint of unfair labour practice filed pursuant to sections 94(1)(a), 94(3)(a)(i), 94(3)(e), 96, 97 and 99(2) of the *Code* and sections 133, 134, 136(1) and 147(c) of the *Canada Labour Code* (*Part II–Occupational Health and Safety*) (*Part II of the Code*) (file no. 29537-C). Both matters involve the Maritime Employers Association (the employer or the MEA).

[2] The day before the oral hearing, the Board held a conference call with counsel for the parties, during which counsel for the union informed the Board that the union had no new evidence to add at the interim order application stage to the evidence already on file. Counsel for the MEA indicated that he wished to cross-examine Mr. Collin regarding the affidavit filed by the union and call one witness for the MEA. It was accordingly agreed that the hearing would start with the presentation of the MEA's evidence and that counsel for the union would then proceed first with arguments.

II–Background

[3] The union filed the application for an interim order following the MEA's decision on July 5, 2012, to suspend Mr. Éric Collin, Industrial Safety Representative, for a period of six weeks effective July 9, 2012.

[4] Mr. Éric Collin has been a longshoreman since 2005 and is a union member. He has performed union functions since 2007. In 2008, he was elected Industrial Safety Representative by the union membership.

[5] The letter of suspension sent to Mr. Collin, which was signed by Mr. Jean-Sébastien Barale, Labour Relations Consultant, reads as follows:

Dear Sir:

This is further to the letter of this past June 21, in which we summoned you to a meeting on June 28, 2012, that was also attended by Mr. Nicola Dolbec and your union representatives, Messrs. André Racette, Daniel Fortugno and Alain Bélanger.

You were summoned to said meeting in relation to a letter you had sent to Stéphane Morency on June 14, in which you had made statements amounting to intimidation and threats. Furthermore, as an employee of the Maritime Employers Association, you had clearly violated article 2088 of the *Civil Code of Québec* by breaching your duty to act faithfully toward your employer. For all of these reasons, the Maritime Employers Association summoned you to that meeting, at which you faced a three (3)-month suspension.

At the meeting, you told us that you had already retracted your statements in a letter dated June 21 and that we could consult our law firm in that regard. You indicated that you were sorry about the statements you had made in the letter of June 14. You and your representatives then stated that you had nothing further to add in this regard. You and your representatives considered the matter closed.

As we told you at the meeting of June 28, 2012, your retraction and apology in the letter of June 21 are mitigating factors. However, we cannot ignore the intimidation and the threats that you made.

The Maritime Employers Association accordingly is reducing your suspension from three (3) months to six (6) weeks.

You are therefore suspended from July 9 to August 19, 2012, inclusively. **Your port access is also suspended. You will therefore not be allowed on Port of Montréal property during that period.**

Please be advised that any recurrence will lead to stricter action up to and including dismissal.

(translation; emphasis added)

[6] It seems that what led Mr. Collin, in his capacity as Industrial Safety Representative, to send the letter of June 14, 2012, to Mr. Stéphane Morency, Director of Labour Relations at the MEA, was the MEA's introduction of a working time management policy in some terminals on June 11, 2012. In the letter of June 14, 2012, Mr. Collin stated among other things that the new work methods flowing from said policy exposed workers at the Port of Montréal to high risk. He accused the MEA of reckless behaviour. The closing paragraphs of Mr. Collin's letter read as follows:

You have trampled the longshoremen's health and safety rights, even acting criminally under law by failing to take the action that it is your duty to take, thereby demonstrating wanton or reckless disregard for the lives or the safety of others.

Be aware that if a longshoreman suffers a serious work-related injury, you will be the one to bear the blame and may be held personally responsible under Canada's *Criminal Code*.

(translation)

[7] On June 20, 2012, the MEA sent Mr. Collin a letter of formal notice, in which it accused him of making untrue and baseless statements regarding the working time management policy, of breaching his duty of faithfulness, and of making what it considered unfounded and illegal allusions to criminal liability on the part of Mr. Morency. The MEA demanded a retraction in writing from Mr. Collin. It also demanded that the retraction be sent to all recipients of his letter of June 14, 2012 (the President and CEO of the Port of Montréal, the MEA's Director of Occupational Health and Safety, the terminal managers and the workplace health and safety committees), and that it be posted in the break rooms at the Termont, Cast and Racine terminals.

[8] The next day, June 21, 2012, Mr. Collin sent a letter of retraction. On June 28, 2012, the MEA met with Mr. Collin and union representatives, as indicated in the MEA's letter of July 5, 2012, and it suspended Mr. Collin for six (6) weeks, to August 19, 2012. According to the employer, Mr. Collin's statements in his letter of June 14, 2012, were unacceptable and went far beyond the limitation of liability enjoyed by a union representative in the performance of his duties.

[9] On July 10, 2012, the union filed a grievance (no. 12-07-096) to challenge the MEA's decision to suspend Mr. Collin.

[10] The parties recognize that the positions of union health and safety consultant and industrial safety representative are actually one and the same. The responsibilities associated with the position of industrial safety representative are set out in the collective agreement binding the parties. Article 11.21 thereof makes provision for the position and describes the associated responsibilities. It reads as follows:

The M.E.A. and the companies acknowledge the person designated by the Union as the industrial safety representative. The salary of the industrial safety representative will be the equivalent of forty-eight (48) hours per week at time and one half the basic rate to allow the industrial safety representative to perform this work.

The employer will reimburse the Union a maximum amount of one thousand and two hundred dollars (\$1,200) annually, on presentation of supporting documents, to allow the industrial safety representative to participate in meetings and symposiums on health and safety, on the I.S.P.S. Code and/or the Canadian Marine Advisory Council (C.M.A.C.).

Moreover, the employer will reimburse the Union a maximum amount of seventy dollars (\$70) monthly, on presentation of supporting documents, to cover the costs of a cellular phone for the industrial safety representative.

The industrial safety representative:

- a) participates in the Health and Safety Coordinating Committee and may sit at all of the meetings held by the local committees;
- b) assists the employee representatives to execute their occupational and industrial health and safety mandate;
- c) is immediately notified of all refusals to work or accidents that occur at a worksite as soon as the employer becomes aware [*sic*] of them, whether or not there is a work stoppage. In such cases, the safety representative helps the employee(s) involved. He participates in the investigation or delegates another person to do so;
- d) when there is an accident at a worksite, helps the worker fill in the CSST form as well as any other pertinent document;
- e) informs the worker on safety measures and makes sure that workers understand occupational health and safety regulations;
- f) participates in all occupational and industrial health and safety investigations and inspections and, if required, seeks the advice of professionally and technically qualified persons.

[11] With regard to the merits of the unfair labour practice complaint (file no. 29537-C), all of the parties agreed at the oral hearing to the referral of the issue of the merit of Mr. Collin's suspension to a grievance arbitrator pursuant to section 98(3) of the *Code*.

[12] At the request of the parties, the Board determined this application for an interim order on an urgent basis, given that the disciplinary action taken by the MEA is already in effect.

III--The Evidence

A--The MEA

[13] The first witness called by the MEA was Mr. Éric Collin. He stated that he had carried out the responsibilities of Industrial Safety Officer since 2008. He had been elected by the union membership. In 2007, he had filled in for Mr. Vincent Thomin as Industrial Safety Officer after the latter had sustained an injury at the Port of Montréal. Mr. Collin admitted that he was aware that Mr. Thomin, the then Industrial Safety Officer, had been denied access to the Port of Montréal for a period of time from October or November 2006 to August 2007, but had not been replaced since he had continued to perform his duties without access to the port.

[14] Mr. Collin indicated that someone usually filled in for him when he had to be away from work and that his absence in connection with the suspension in effect since July 9, 2012, was the first instance where he had not been replaced. He also indicated that he had told the MEA the day after he had been suspended that Mr. Alain Bélanger would be filling in for him, but that the union had changed its mind in the end, deeming that he was not replaceable. He added that, in any event, his suspension had not prevented him from continuing to perform his duties at the union's offices and so he felt that he was able to provide the same services to union members.

[15] When questioned about his attendance in the event of incidents or accidents at the port, he indicated that he was always present for investigations, but that it was possible to delegate a co-chair, referring to the members of the local committees set up under Part II of the *Code*. He added that he attends local committee meetings and can ask someone with experience to fill in for him when he is away on vacation for example, naming Messrs. Alain Bélanger and Sylvain Charron and Ms. Caroline Labelle in this respect.

[16] In response to a question from his counsel, Mr. Collin indicated that once, while he had been away at a union conference in Vancouver, a serious work-related accident had occurred and he had had to manage the matter from Vancouver, handling a large number of calls and innumerable emails.

[17] The second witness called for the MEA was Mr. Alexandre Gagnon, the MEA's Director of Occupational Health and Safety since January 27, 2012. Prior to taking this position, he had been an occupational health and safety consultant and a labour relations consultant. In his capacity as Director of Occupational Health and Safety, he is responsible for the application of Part II of the *Code* and the work place health and safety provisions of the collective agreement. Mr. Gagnon reports to Mr. Jean Bédard, President and CEO of the MEA. Mr. Gagnon indicated that, to his knowledge, someone always filled in for the Industrial Safety Representative when he was away on vacation or for any other reason. He stated that the industrial safety representative whose duties are defined in the collective agreement is not appointed under Part II of the *Code*. He added that, on July 6, 2012, in connection with an investigation into a refusal to work, Mr. Collin had advised the Labour Canada official that he had been suspended from his duties as Industrial Safety

Representative for six (6) weeks effective July 9, 2012, and the Labour Canada official had responded that he would continue to do business with the members of the local health and safety committees.

[18] The MEA submits that, unlike the responsibilities of the members of the union executive, the responsibilities associated with the position held by Mr. Collin as a union occupational health and safety consultant /industrial health and safety representative are negotiated by the MEA and the union and, contrary to what was stated by Mr. Collin, the latter is not a health and safety representative within the meaning of Part II of the *Code* and does not benefit from limited liability in the exercise of his responsibilities.

[19] With regard to the applicable law, the MEA submits that an application for an interim order pursuant to section 19.1 of the *Code* is an exceptional measure and that the Board must exercise its discretion in this regard cautiously and sparingly. It adds that not all union activities are protected under section 94(1) of the *Code* and that the provision in question does not give free rein to do anything whatsoever at any time on the basis that the actions fall within the framework of union activities.

[20] Counsel for the MEA further submits that the statements made by Mr. Collin in his letter of June 14, 2012, for which he was suspended, were serious and included allegations that the actions of the MEA and of Mr. Stéphane Morency were criminal in nature, which in his view went far beyond what is recognized as acceptable.

[21] Counsel adds that, based on Mr. Collin's testimony, it has been shown that Mr. Collin's responsibilities may be assumed by other experienced people; furthermore, Mr. Collin admitted that he was able to carry on doing his job even if barred from the Port of Montréal for a period of six (6) weeks.

[22] According to counsel for the MEA, Mr. Collin's case cannot be compared with that of the suspended union president in *TVA Group Inc.*, 2012 CIRB 628, in which the Board granted the

application for an interim order requiring the employer to temporarily recognize the union president and give him access to its facilities.

[23] Counsel further submits that the fact that Mr. Collin retracted his statements the day after he was sent the formal notice does not prevent the employer from taking disciplinary action given the fact that Mr. Collin's statements clearly went beyond the bounds of the position he holds. Counsel for the MEA is asking that the Board dismiss the application for an interim order filed by the union and Mr. Collin.

B—The Union

1—Order Sought

[24] Through its application for an interim order, the union is seeking the following from the Board:

- an order that the MEA recognize Mr. Éric Collin as the union representative and, more specifically, the Industrial Safety Representative, on an interim basis;
- an order that the MEA allow Mr. Collin to enter onto Port of Montréal property on an interim basis for the purpose of carrying on business as the union's Industrial Safety Representative.

2—Facts Alleged

[25] As already indicated and agreed with the parties, the union did not provide any new evidence at the hearing in support of its written submissions (complaint and reply) already on file or Mr. Collin's affidavit in support of the application for an interim order. The union made the following submissions:

- Mr. Collin is a health and safety consultant and is the sole person elected and the sole person responsible for health and safety for the union, which represents some 900 workers at the Port of Montréal;

- Mr. Collin is the designated health and safety representative within the meaning of section 136 of Part II of the *Code*;
- Mr. Collin's enjoys limited liability pursuant to sections 136 and 137 of Part II of the *Code*;
- Mr. Collin's functions provided for in the *Code* are incorporated into the responsibilities described in article 11.21 of the collective agreement.

[26] The union submits that, as part of his duties, the Industrial Safety Representative is on the docks of the Port of Montréal on a regular basis, that is, several times a week. Additionally, the Industrial Safety Representative attends local health and safety committee meetings, which are held monthly in the offices of the different terminals of the Port of Montréal or at the MEA's linesmen training centre. The union adds that, from both legislative and conventional points of view, the Industrial Safety Representative plays a key role in day-to-day operations at the Port of Montréal and submits that Mr. Collin is the union's health and safety resource person.

[27] The union is of the view that the MEA's actions in suspending Mr. Collin and denying him access to the port are detrimental to the proper administration of the union and to its representation obligations and undermine the union's credibility in the eyes of its members, thereby violating the provisions of the *Code*, including sections 94(1)(a) and 94(3). It adds that the action taken by the MEA negates union representation and denies the freedom of speech and association provided for under the *Charter* and recognized by the courts. The union refers in this regard to an article by professors Christian Brunelle and Mélanie Samson entitled "La liberté d'expression au travail et l'obligation de loyauté du salarié : plaidoyer pour un espace critique accru," (translation: Freedom of speech in the workplace and employees' duty of loyalty: an argument for greater breathing space) (2005) 46 *Les Cahiers de droit*, pp. 847-904. In the union's view, the arguments made therein show the prejudice suffered by the union and the importance of issuing an interim order to ensure fulfilment of the objectives of the *Code*.

[28] According to counsel for the union, the fact of whether or not Mr. Collin's position comes under Part II of the *Code* must be put into perspective, since the only important issue in this matter

concerns the fact that Mr. Collin is a health and safety representative designated by the union. He refers to the Board's recent decision in *TVA Group Inc.*, *supra*, and maintains that, as was the case in that matter, the employer cannot suspend Mr. Collin and deny him access to the Port of Montréal for the purpose of conducting union business, regardless of whether or not he is replaceable. He adds that Mr. Collin was designated by the union—elected by the union membership—and it is up to it to decide when and with whom to replace him.

[29] Counsel for the union also refers to another Board decision, in *Maritime Employers' Association* (1985), 63 di 69; and 12 CLRBR (NS) 18 (CLRB no. 540), indicating that the statements made by Mr. Collin were not like the violence committed and threats made by the union representative in that other matter and that, the day following the formal notice from the MEA, Mr. Collin apologized and retracted his statements.

[30] Counsel also referred to several other decisions by grievance arbitrators and other common law courts. In closing, he stated that the Board should grant the application for an interim order on a *prima facie* basis, given the reverse legal onus provided for under section 98(4) of the *Code* and the fact that the unfair labour practice complaint had been filed under section 94(3) of the *Code*, among others.

IV—Analysis and Decision

[31] Section 19.1 of the *Code* makes the following provision in regard to interim orders:

19.1 The Board may, on application by a trade union, an employer or an affected employee, make any interim order that the Board considers appropriate for the purpose of ensuring the fulfilment of the objectives of this Part.

[32] In its decision in *TVA Group Inc.*, *supra*, the Board reiterated the principles that guide it in exercising its discretion in relation to interim orders and then pointed out that such orders serve first and foremost to establish the conditions necessary to ensure the fulfilment of the objectives of Part I of the *Code* while the Board deliberates on the merits of the underlying matter. It also reiterated that

the tests for considering such matters have not been specifically defined. The Board stated the following:

[23] As recently ruled by the Board in *Bell Mobility Inc.*, 2009 CIRB 457, given the variety of matters that come before it pursuant to the *Code*, the Board has deliberately refrained from establishing a specific test for the application of section 19.1 of the *Code* and has maintained its discretion to issue an interim order in cases where it deems it appropriate to do so. However, this discretion will be exercised cautiously and sparingly.

[24] It is also important to remember that issuing an interim order in no way prejudices the merits of the underlying application or complaint. Doing so is intended solely to establish the conditions necessary to ensure that the attainment of the objectives of Part I of the *Code* is not compromised while the Board deliberates on the merits of the underlying matter. In other words, interim relief can be provided by the Board to neutralize the potential harm of an **alleged** unfair labour practice pending final determination of a matter, as in the present case.

[25] It is important in this regard to recall the objectives of the *Code*, as the Board did in *Bell Mobility Inc.*, *supra*. The preamble to the *Code* sets out Parliament's commitment to freedom of association and free collective bargaining as the bases of effective labour-management relations. Parliament deems the development of good industrial relations to be in the best interests of Canada in ensuring a just share of the fruits of progress to all. Section 8(1) of the *Code* expressly affirms that every employee is free to join the trade union of his or her choice and to participate in its lawful activities.

[33] In the above-noted matter, the Board found that the employer's refusal to recognize the president of the union and allow him entry to the employer's facilities to conduct union business constituted *prima facie* evidence of interference in the union's affairs such that the Board should intervene. As in the instant case, the employee concerned in that matter had been suspended and denied access to the employer's facilities during the suspension period. The Board issued an interim order.

[34] In the instant matter, however, the Board considers that the facts differ substantially and lead to different reasoning.

[35] Mr. Collin was indeed designated by the union, but his position derives not from an appointment under the union structure itself but, rather, from the collective agreement. The existence of the position of Industrial Safety Representative held by Mr. Collin is the result of bargaining between the MEA and the union, as evidenced by the description of the position in article 11.21 of the collective agreement. This is a major difference between the instant matter and the matter in *TVA Group Inc.*, *supra*, in which the employer refused to recognize the president of the actual union

structure and prevented him from performing his representation duties as the ultimate head of the union.

[36] In the instant matter, it is alleged that the objectives of the *Code* are being undermined by interference by the employer in union matters. However, although Mr. Collin's position is intended to protect union interests in the area of health and safety and is very important to the employees concerned, it does not come under the union structure and is not controlled by the union structure.

[37] Without entering into the debate regarding the provisions of Part II of the *Code*, the Board considers that it is fairly clear that Mr. Collin was not designated pursuant to such provisions and finds the MEA's arguments in this regard compelling. The industrial safety representative within the meaning of the collective agreement is not legally equivalent to a member of a work place health and safety committee within the meaning of sections 135(1) and 135.1 of Part II of the *Code* or a representative appointed for a work place at which fewer than twenty employees are employed pursuant to section 136(1) of Part II of the *Code*. Further, in his testimony, Mr. Alexandre Gagnon confirmed that a representative of the federal authority responsible for enforcement of Part II of the *Code* (Labour Program, Human Resources and Skills Development Canada) would continue to do business with the local health and safety committees during Mr. Collin's absence.

[38] The Board shares the union's conclusions that the fact that a union representative can be replaced is not a decisive factor. However, in this matter, Mr. Collin himself admitted in his testimony that not being able to access Port of Montréal property during his suspension "did not change anything for him" (translation). Mr. Collin explained that he was able to carry on doing his job as representative using electronic means and that he could easily reach the employers at the Port of Montréal. He therefore felt that he could continue to provide the same services to union members. In any event, his offices are not on Port of Montréal property.

[39] Furthermore, the evidence shows that others filled in for the Industrial Safety Representative during vacation or other absences in the past and that this never created any problems. Those who filled in were always people with knowledge of and experience in the area of occupational health and

safety, such as former members of local health and safety committees. They were not elected by the union to act as industrial safety representatives.

[40] Finally, according to the evidence heard, Mr. Collin's predecessor was denied access to the Port of Montréal by the MEA for several months in 2006–2007 and yet was able to continue performing his duties as Industrial Safety Representative without any problems and without the union seeking intervention by the Board.

[41] For all of these reasons, the Board finds that it is not necessary to issue an interim order in the instant matter to ensure fulfilment of the *Code*'s objectives pending a determination regarding the merits of the disciplinary action taken against Mr. Collin or the end of the suspension on August 19, 2012. The application for an interim order is therefore dismissed.

[42] Additionally, all of the parties have agreed to proceed by means of grievance arbitration to address the issue of the merits of the disciplinary action taken against Mr. Collin. Section 98(3) of the *Code* provides that the Board may refuse to determine any unfair labour practice complaint if, in its opinion, the matter could be referred by the complainant to arbitration pursuant to a collective agreement. The Board accordingly grants the employer's request that the matter on the merits be referred to grievance arbitration and that it refuse to decide the complaint in file no. 29537-C.

Translation

Louise Fecteau
Vice-Chairperson